NYSE Directors
Centris Group

By Jack Feldman

MONTHS IN REVIEW: Fall 2016

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review a decision from the Second Circuit Court of Appeals, two federal district court decisions, one decision from the Office of State Review, and an advisory opinion by OSEP.

The Second Circuit Court of Appeals dismissed a claim for tuition reimbursement, finding that an IEP need not specify the precise amount of time a student is expected to spend in transitional vocational training versus academics. We also look at two federal district court cases regarding the Rebecca School – a unilateral placement in New York City providing services to children with developmental disorders with 1:1 instruction in the DIR methodology. In one case, the court remanded the matter back to the SRO for explicit findings as to whether a private school's methodology was necessary in order to implement the IEP's goals; in the other, the court found that the IEP needed to describe a student's peers' functional levels in the anticipated program. The SRO upheld a hearing officer's compensatory education award in light of a school district's inability to document whether a student's services were actually provided. Last, we look at a recent advisory memo from the DOE's Office of Civil Rights, which advises IHO's that parents may essentially invite whomever they choose to their child's due process hearing as an observer.

Second Circuit Court of Appeals

***

I. IEP Sufficiently Detailed to be Implemented Despite not

Specifying the Amount of Time Spent in the Vocational Education Component.

***M.M. v. New York City Department of Education*, -- Fed. Appx. – (2016), No. 15-1200-CV, 2016 WL 4004572 (July 26, 2016) (2d Circuit)**

SALIENT FACTS:

J.S., was an eighteen-year old student with autism at the time the hearing began. He was unilaterally placed by one of his parents at the Cooke Center for Learning and Development for the 2012-13 school year. On May 22, 2012, the CSE convened to develop an IEP for J.S. for the 2012-13 school year. J.S.'s mother was present for this meeting. In developing the student's IEP, the CSE relied on several reports: a Comprehensive Psychoeducational Evaluation conducted by a private institution in 2009, a Cooke Progress Report from 2011-12, and a transitional report developed by Cooke. Rather than conducting a triennial reevaluation of J.S. or a vocational assessment, the CSE team relied on the 2009 Psychoeducational Evaluation that was privately obtained by the parent.

Based on discussions during the meeting, the CSE recommended that J.S. be placed in a 12-month program that consisted of a 12:1:1 special education class at a specialized school. The CSE also recommended that the student receive three 45 minute sessions per week of speech language therapy, one 45 minute session of individual counseling, and one 45 minute session of group counseling. The IEP contained measurable postsecondary goals to assist J.S. with his transition from school to adulthood.

On June 15, 2012, the District sent a final notice of recommendation ("FNR"[1]) to J.S.'s mother recommending the McSweeney School. On June 20, 2012, J.S.'s mother and a Cooke educator visited the school. They claimed that during the visit a parent coordinator at the school told them that because of J.S.'s age, he would be placed at a full-day work site. J.S.'s mother objected to the school placement and wrote the district two letters objecting to McSweeney as an appropriate placement for J.S.'s needs. His mother received no response from the district. I n March 2013, J.S.'s mother filed a due process complaint seeking tuition reimbursement for the 2012-13 school year.

ADMINISTRATIVE DETERMINATIONS:

The IHO denied the Parent's request for tuition reimbursement, finding that the IEP provided FAPE. The IHO found that the district did not violate IDEA by failing to conduct a triennial reevaluation of the student because the 2009 Psychoeducational Evaluation relied on for developing the IEP was within the

[1] An FNR is a letter used exclusively in New York City to notify a parent of the brick-and-mortar placement which will implement the student's IEP program.

three-year statutory period. The IHO also found that the 12:1:1 classroom placement was appropriate, and that the recommended program had a proper balance of academic instruction and vocational training that could have been implemented at the McSweeney School. The parent appealed this decision to the SRO.

The SRO affirmed the IHO's decision that the district provided J.S. with a FAPE for the 2012-13 school year. Additionally, the SRO found that the mother's challenge to the school was "speculative" given that J.S. never attended the recommended placement. The parent appealed the SRO's decision to the District Court.

DISTRICT COURT'S DECISION:

The District Court upheld the SRO's decision. The Court held that speculation that a school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement. The District Court found that: (1) the lack of a triennial evaluation did not render the IEP inappropriate because the CSE had sufficient evaluative materials before it when developing the student's IEP; and (2) the lack of a reevaluation did not deprive the mother of her opportunity to participate in the decision-making process because a) she was present at the meeting; b) the CSE considered the content and results of her independent evaluation; c) she visited the recommended school placement; and d) she had her counsel write a letter to the district explaining why she felt the placement school was inappropriate. In reviewing the recommended transition plan, the District Court found that the lack of a vocational assessment did not deny the student a FAPE, because the IEP was not vague regarding J.S.'s transitional and vocational goals. In dismissing the parent's claim, the District Court deferred to the SRO and IHO's credibility findings when considering whether the recommended 12:1:1 program was appropriate for J.S., relying on the testimony of the school district witnesses. The parent appealed.

CIRCUIT COURT'S DECISION:

The U.S. Court of Appeals for the Second Circuit affirmed the district court's decision. The fact that a teenager's IEP did not specify how much time he would spend on academic instruction as opposed to vocational instruction did not entitle his mother to recover the cost of his private placement from the school district. The Court found that the IEP provided sufficient information to the placement in order to implement the IEP's recommendation. The Court also found that even were the lack of this information a procedural violation, the parent's ability to assess the adequacy of the IEP was not impeded because the parent was involved in the development of the IEP, had provided an independent evaluation to the committee, and participated in the May 2012 meeting when the IEP was prepared.

Although the statute mandates that the DOE conduct a triennial reevaluation of a student at least every three years, the lack of such a reevaluation did not

render the IEP inappropriate. The Court indicated that the CSE had sufficient evaluative information before it when it created the IEP. The information relied on by the CSE included three reports concerning the student, and input from the student's parent and two teachers affiliated with the Cooke School. Therefore, the Court concluded that the district's procedural violation did not amount to a denial of FAPE.

WHY YOU SHOULD CARE:

A belt and suspenders approach may mean the difference between an IEP which answers all the questions a finder of fact may have at a hearing versus one which must be reviewed by the Second Circuit Court of Appeals. While both may result in a finding that the school district offered FAPE, an appeal to the federal courts is exponentially more expensive. Therefore, evaluations should be conducted in a timely fashion and, at the very least, every three years. Program descriptions should specify the duration and location of all recommended services. Recommendations contained in the IEP should also be based on data, such as transitional or vocational needs. The more detail the IEP provides, the less likely a district will have to defend it. A school district should be able to point to the source of each need, goal, or recommendation in the body of the IEP.

Federal District Courts

***

I. CSE Prevails in Defending its IEP by Documenting Parents' Participation at Meeting.

***T.C. and A.C. v. New York City Department of Education*, No. 15 Civ. 2667 (KPF), 2016 WL 4449791 (Aug. 24, 2016 S.D.N.Y.)**

SALIENT FACTS:

A.C. was a pre-school child with a disability diagnosed with an autism spectrum disorder. Following preschool services, the parents placed A.C. at the Rebecca School during the 2010-11 school year, specifically to expose the child to the private school's DIR[2] methodology. In March 2011, the CSE convened to recommend a program for the 2011-12 school year, considering a January 2011 classroom observation, December 2010 progress reports from the Rebecca School, a 2008 DOE psychoeducational evaluation, and a 2008 social history update. The CSE recommended a 12-month program in a 6:1:1 setting with the addition of a 1:1 transition paraprofessional, along with a host of related services. An FNR was sent to the parent on June 13, 2011, alerting the parent to the placement where AC's IEP would be implemented. On June 20th, the parent wrote to the DOE claiming

[2] Or *Developmental, Individual-difference, Relationship-based* methodology; also known as Floortime.

she had not received an FNR, and detailed her concerns with the offered IEP, providing notice of her intention to keep A.C. at the Rebecca School. The parent followed this correspondence with an August 8th letter describing her visit to the proposed placement and her continued rejection of the IEP setting. She then filed for due process in April 2012.

ADMINISTRATIVE DETERMINATIONS:

The IHO found that the DOE failed to offer the student a FAPE for the 2011-12 school year, and awarded the parents tuition reimbursement for the cost of the Rebecca School. The IHO found that: (i) the IEP was substantively deficient; (ii) the CSE did not create a program reasonably calculated to produce educational benefit; (iii) the IEP was created without the benefit of sufficient evaluative data and did not include adequate strategies to address A.C.'s academic or behavioral deficits or recommend a program with adequate supports or an appropriate classroom placement; (iv) the DOE's procedural violations deprived A.C. of a FAPE; (v) the DOE never appropriately implemented A.C.'s IEP; (vi) the failure to prescribe parent training was not harmless, and it was not credible that the recommended placement could have provided this service; and (vii) the DOE failed to establish that the placement could provide related services as recommended, including sensory equipment and a PROMPT-trained speech therapist. The IHO also determined that the Rebecca School was an appropriate placement, because it provided A.C. with a comprehensive individualized educational program wherein he had made progress, and that the equities favored the parents. The DOE appealed.

The SRO reversed the IHO's decision and found that the DOE had offered A.C. FAPE. The SRO ruled that even though the March 2011 IEP lacked information regarding the student's then-current functioning in the area of speech-language development, that did not amount to denial of a FAPE because those needs were discussed during the CSE meeting, relevant goals were included in the IEP, and related services were increased from the previous IEP. The SRO also found that the IEP goals were neither vague nor inappropriate, because they addressed the student's needs. The SRO ruled that the parents' claim that the IEP required use of DIR methodology was without merit, because the record did not demonstrate that the IEP could only be implemented using DIR methodology. With regard to the parents concern about their child's sensory needs, the SRO found the record supported a finding that the IEP sufficiently described the student's sensory needs and recommended sufficient supports and services to address those needs. Next, the SRO held that the district's failure to include parent counseling and training in the IEP did not constitute a procedural deficiency, and did not affect the IEP's substantive adequacy, because the school was required to provide it in any event. The parents' challenges to the placement site were speculative since their child had never actually attended the placement. Those challenges also failed because the record did not demonstrate that the district would have deviated from the IEP in a material or substantial way that

would have resulted in a denial of a FAPE. With regard to the parents' last two claims, the SRO held that a CSE is not required to specify methodology on an IEP, and the district is not required to furnish every piece of equipment thought desirable by the parents for the student's sensory needs. The parent appealed to federal district court.

COURT'S DECISION:

The court affirmed the SRO's decision. Regarding the Parents' Procedural Challenges, the Court found none denied the student FAPE. The parents' claim that they were prevented from participating at the March 20111 CSE meeting was unavailing because a Parent Member was present at the meeting, the minutes reflected that the parent gave feedback and made requests which were incorporated into the IEP. The Court found further that the parent's failure to receive a draft of the IEP during the meeting did not inhibit her right to participate or lead to a denial of FAPE.

The Court had concerns that the DOE failed to respond to the parent's June and August 2011 letters. However, the Court noted that the issues raised in the letters were either a) the same issues discussed at the March 2011 CSE meeting, or b) impermissible speculation as to the DOE's recommended setting. The Court held that, even though the district's failure to respond to the parent's letters constituted a procedural violation that should not have occurred, such failure to respond did not amount to denial of a FAPE.

Regarding the parent's challenge that the CSE failed to consider sufficient evaluative materials, the Court upheld the SRO's finding that the CSE considered sufficient "current evaluative information" to enable it to develop the IEP. The record did not indicate that the evaluations were untimely, or that anyone, including members of the CSE team or the parents, objected during the meeting to proceeding without updated evaluations. Even though the district did not conduct a re-evaluation prior to the meeting, the CSE considered the student's classroom evaluation, psycho-educational evaluation, and the Rebecca School progress report when developing the IEP. The Court deferred to the SRO's expertise and assessment that the lack of information regarding the student's speech-language functioning, while an error, did not amount to denial of FAPE, particularly given the hearing testimony and the specificity of the IEP's goals in that regard. The court reasoned that the IEP's lack of information regarding the student's baseline functioning did not amount to denial of FAPE because the CSE took the parent's concerns and the Rebecca School progress report into account when it formulated the IEP's objectives. Thus, the CSE had sufficient evaluative materials to develop an IEP.

The Court found that the record supported the SRO's assessment that the IEP adequately described sufficient supports and services to meet the student's sensory needs. The evaluations considered were sufficiently recent and were not

disputed by the family. With regard to the parents' challenge to the placement's capacity to implement the sensory portions of the IEP, the Court found support in the record that the placement site could provide sensory equipment and that the parents' particularized complaints (about a specific piece of equipment) were inadequate to render the IEP inappropriate, since the IEP need not provide every special service necessary to maximize a handicapped child's potential.

Regarding the program recommendation, the Court deferred to the SRO's opinion that the paraprofessional would ameliorate the student's identified issue with transitioning to a new setting. The Court identified that the absence of parent counseling and training amounted to a procedural violation; however, the Court found that the parent was informed of parent training during the CSE meeting and its programmatic availability at the placement. Thus, the Court affirmed the SRO's decision that the district's failure to provide parent counseling and training in the IEP was not a denial of FAPE.

The Court found that the parents' challenge to the placement's ability to provide occupational and speech therapy were not sufficient to demonstrate that the IEP was substantively inadequate because the challenges were speculative. The Court dismissed the remainder of the parent's arguments, especially those speculating as to the ability of the placement to provide related services or its lack of sensory equipment.

The Court was unable to determine whether the DOE's placement was required to utilize DIR methodology, the same methodology used by the Rebecca School, in order to implement the IEP's goals. The Court remanded the dispute back to the SRO on this singular issue to determine whether the IEP as a whole, and in particular, the goals incorporating DIR-related terminology, was likely to produce progress for the student absent the use of DIR methodology. The remand to the SRO is pending.

WHY YOU SHOULD CARE:

The DOE in this instance was able to demonstrate programmatic supports – specifically, parent counseling and training – despite its absence on the IEP, by showing that this service was discussed at the student's CSE. While the courts have been moving towards limiting a school district's case to the four corners of the IEP, this court seems to be signaling that issues discussed by the CSE are fair game to support an offer of FAPE. This suggests that a well-written comments section or meeting minutes and prior written notice letter may be useful in shoring up any deficiencies later identified in the IEP. A school district should get credit for addressing a parent's concerns at the CSE level. Robust comments and prior written notice letters help show that the District is credible when its witnesses testify that a subject was discussed at the CSE meeting.

Furthermore, school districts must continue to be careful when adopting recommended goals from a student's private placement. Should the private placement use a particular methodology, the IEP should identify how those goals will be implemented in the absence of the private school's methodology.

***

II. Parents Challenge to Student's Peers' Verbal Ability in Proposed Placement Wholly Speculative.

***E.P. v. New York City Department of Education*, 68 IDELR 21 (SDNY 2016)**

SALIENT FACTS:

The parent of a New York teen with autism had attended the Rebecca School since the 2011-2012 school year, and except for the year litigated in this case, the school district had funded the unilateral placement pursuant to a stipulation of settlement. For the 2012-13 school year, the CSE recommended a 6:1:1 setting in a special school for the student. The parent toured the proposed school and concluded that the placement was not advanced enough and was too disorganized for her child. According to the parent, when she toured the school the unit coordinator described three of the children in the 6:1:1 class as nonverbal, and the other three as having minimal verbal skills, allegedly far below the child's functional level. The parent also said she observed the students in the 6:1:1 class running in the hall with students from a 12:1:1 class. The parent filed a due process complaint alleging that the placement was inappropriate and seeking tuition reimbursement.

ADMINISTRATIVE DETERMINATIONS:

The IHO concluded that the DOE failed to provide the student with FAPE. Specifically, the IHO found that (1) the IEP neglected to include information on the appropriate functional grouping for the student; (2) the IEP contained insufficient information on the student's sensory needs; (3) the student's parent was "inappropriately thwarted in her efforts to view the school;" and (4) the IEP did not include a parental counseling provision. The IHO also found that the parent had met her burden of showing that the private school was an appropriate placement and that equitable considerations favored reimbursement. The DOE appealed.

The SRO reversed the IHO's decision for the following reasons: (1) there is no legal requirement to specify functional grouping in an IEP, thus, the IEP did not deny the student FAPE; (2) the IEP accurately described the student's sensory and fine motor needs, and that description was consistent with the evaluative

information available in the June 2012 CSE; (3) omission of parental counseling and training did not deny FAPE even though it violated state regulations; (4) the classroom placement was appropriate because the parent's challenge to the implementation of the IEP was speculative, since the parent and her son did not avail themselves of the proposed placement, and even if such speculative challenges were permissible, there was no basis to conclude that the DOE would have "deviated from the student's IEP;" and (5) the SRO reversed the IHO's determination that the parent was denied an opportunity to offer input on the placement. The parent appealed the SRO's decision to the federal district court.

COURT'S DECISION:

The District Court sustained the SRO's decision. On the question of whether the DOE denied the student an adequate education by failing to specify in the IEP that the student requires verbal peers, the court found that, while such information would be helpful, the district was not required to specify functional grouping information in the IEP. While the NYS regulations are designed to ensure that students with disabilities are suitably grouped, requiring that such students be placed with students who have similar levels of academic achievement, social and physical development, and management needs. The Court specified that the CSE should consider all these factors, not merely social abilities. Because the IEP described the student's present levels of social development and included a number of goals that were aimed at encouraging the student's social development (such as addressing his difficulties with initiation), the IEP contained sufficient detail about the student's social functioning and deficits to allow for the DOE to assess the appropriate functional grouping consistent with the requirements of the regulations. Regarding the parent's challenge to the placement itself, the Court found that the parent's concerns were wholly speculative and therefore not a basis to challenge the IEP. The court stressed that parents may not challenge a placement by merely arguing that an IEP wouldn't have been effectively implemented at the proposed school. The parent contended that the student's prospective classmates were not as verbally advanced as her son, but her only evidence regarding the verbal functioning of the child's prospective classroom was her account of the unit coordinator's characterization of the students. Furthermore, the parent's hypothesis relied on her erroneous assumption that the same students would be attending the class when her son joined it.

Regarding the question of whether the parent's right to participate in the formulation of her child's IEP was impeded by the DOE, the Court found that the parent attended and participated in the CSE meeting, her concerns were reflected in the IEP, she was timely notified of the placement, and she visited and was given a tour of the school. While the parent was unable to learn the identity and verbal ability of her son's prospective peers, this was not an impediment to her child's right to a FAPE.

The Court upheld the SRO's finding that the IEP accurately described and made appropriate recommendations to address the student's sensory and fine motor needs. The Court agreed with the SRO and deferred to the SRO's analysis on this issue, because the sufficiency of goals and strategies in an IEP are the types of issues upon which the IDEA requires deference to the expertise of the administrative officers. Similarly, the Court agreed with the SRO that the failure to provide parent counseling and training was a procedural violation, but did not rise to the level of a FAPE violation. In upholding the SRO's decision, the Court denied the parent's request for tuition reimbursement.

WHY YOU SHOULD CARE:

In the case reviewed, the parent never would have accepted a district placement; she had placed her child at the Rebecca School for the past five school years and counting. When presented with such a parent, CSEs are advised to prepare every IEP as if it will be challenged at an impartial hearing. Neither the District Court nor the SRO had access to the functional levels of the proposed peers for the students. A detailed class profile would have clarified that issue. Such an item protects a school district by clearly providing contemporary information about a student's anticipated peers, and allowing an IHO to see what the parents saw when the unilateral placement decision was made.

There is no such thing as a "perfect" IEP. However, the Commissioner's Regulations define a minimum floor for the procedural appropriateness of an IEP. There is little excuse, absent parental intransigence, for a CSE to fail to fulfill certain responsibilities, such as inviting the proper members to the meeting, performing timely evaluations, considering parent counseling and training, or conducting FBAs when a student's behaviors interfere with his and/or other's education. The regulations provide the blueprint for every child's IEP. Following that blueprint can only strengthen a school district's position and, more importantly, ensure that each IEP is more likely to be bulletproof – substantively and procedurally.

Office of State Review

***

I. District's Record Keeping Errors Lead to an Award of Significant Compensatory Hours.

***Appeal of a Student with a Disability*, Appeal No. 16-033 (SRO Appeal July 15, 2016)**

SALIENT FACTS:

A student classified with a speech and language disability had been attending a charter school since kindergarten during the 2013-14 school year. At

his annual review for the 2014-15 school year, the CSE recommended that she be moved into an ICT class for math, and be part of the general education class in an ICT program for the remainder of his classes, along with once weekly individual and group sessions of occupational therapy and speech/language therapy, and an individual session of physical therapy. For the 2015-16 school year, the CSE again conducted its annual review, recommending that the student be placed in a 12:1:1 setting along with similar related services. At the CSE meeting, the parent advised the committee that her son had received no occupational therapy during the 2014-15 school year, nor the support of a special education teacher in the ICT setting.

During the summer of 2015, the parent obtained private neuropsychological and education evaluations at her own expense. The student started the 2015-16 school year at the same charter school, repeating first grade in the same 2014-15 setting, the charter school being unable to implement the IEP. The parent requested a program review in October 2015, seeking a nonpublic school setting. One week later and before the committee convened, the parent filed for due process, seeking an order for New York City to issue a "Nickerson Letter.[3]"

Following the filing of the hearing demand, but before the commencement of the hearing, the district requested an opportunity to conduct new evaluations and a classroom observation at the charter school, and provided the parent with a placement recommendation. The parent refused to allow new evaluations to be conducted but consented to the observation. The parent also advised the district that she had visited the proposed placement in the past and found it to be inappropriate for her son, requesting an alternative placement.

IMPARTIAL HEARING DECISION:

At the hearing, the district conceded that it failed to offer the student FAPE. In light of the district's position and after considering the parent's private reports, the IHO found that the student required a program with fewer than 12 children. The IHO ordered the CSE to reconvene and recommend a 12-month "primary special education" program at a location other than the charter school, two hours per week of speech/language and occupational therapies after-school for one year, and the support of a paraprofessional. After considering the extent of the services missed by the student, the IHO declined to order additional, compensatory academic services.

The parent appealed the IHO's decision to the SRO, arguing that the district failed to provide stay-put services during the course of the hearing pursuant to the IHO's interim order (based upon the parties' agreement), and sought compensatory education in the form of 800 hours of special education programming to be used over the following two calendar years.

[3] A Nickerson Letter is a remedy created by the *Jose P.* class action which entitles a parent to immediately place their child in any state-approved private school at no cost to the parent in the event the child has not been evaluated within 30 days of referral or placed within 60 days of referral.

SRO'S DECISION:

The SRO found that the parties agreed, going forward from January 2016, that the student would be entitled to stay-put services consisting of 16 hours per week of 1:1 special education teacher support services ("SETSS"). Rejecting the parent's request for retroactive pendency services, the SRO found that the student was entitled to this service going forward once the parties agreed to stay-put services different from those in the last agreed-upon IEP. However, the SRO found that the district lacked documentation showing that pendency services had been provided during the course of the hearing or the parent's subsequent appeal. The SRO directed the district to calculate the hours missed and provide the student those missed services.

After the parent filed her appeal, the district conceded that the student was entitled to 1:1 SETSS compensatory hours in excess of those ordered by the IHO. In considering a remedy, the SRO directed the district to provide the student no more than 10 hours/week of 1:1 SETSS services, first making up the missed services under pendency then drawing from the bank of separate compensatory services. The SRO further directed that the student receive SETSS services at a location other than the charter school due to its failure to properly implement the 2015-16 IEP.

WHY YOU SHOULD CARE:

The underlying issue of these proceedings was that the CSE developed an IEP that could not be implemented. From this initial error, the child eventually received an award in excess of 1,000 hours of compensatory services. That and the costs of litigation make the result all the more perplexing: how did it get to this point?

From the hearing record, it appears a representative of the charter school did not attend the CSE meeting. His attendance alone would have given the committee an opportunity to learn whether the program it recommended could be implemented. Once the hearing began, the district foolishly trusted that the charter school – after such a significant failure – could implement the IHO's pendency order. The charter school may have provided the student with his pendency services; however, the district was unable to document, for the record, how, when, and where those services were provided.

It is critical to ensure that a classified child actually receives the services recommended in his or her IEP, such as through instructional logs, staff work assignments, bills from out-of-district providers, or some other cotemporaneous methods. The failure to be able to prove that services were provided left the district vulnerable to a challenge claiming they were never provided.

Office of Special Education Programs – Advisory Opinion

***

I. OSEP Clarifies and Expands Parents' Ability to Invite Observers to Attend Due Process Hearings.

***Letter to Eig*, 116 LRP 34792 (Aug. 4, 2016)**

SALIENT FACTS:

The U.S. DOE's Office of Special Educational Programs ("OSEP") recently issued an advisory letter addressing open- and closed- impartial hearings, as well as who parents may invite to attend their child's due process hearings. In sum and substance, OSEP recommended that parents have significant freedom in inviting any observer who may be interested in learning about impartial hearings.

OPINION:

Recently, OSEP was asked a series of questions regarding a parents' right to open an impartial hearing, or making the hearing open to the public. Specifically, OSEP clarified that a school district has no grounds to object to a parents' determination to have an open hearing. In instances where the parents have elected to have a closed hearing, OSEP suggested parents may still choose to invite 1) a family member, 2) educational professionals, 3) others who are not involved in the specific issues of the hearing but are nonetheless interested in learning about the hearing process, or 4) anyone else the parents believe are necessary to provide generalized support to the family.

OSEP carved out an exception to the above when considering whether parents may invite members of the press. Finding no explicit prohibition, OSEP offered that inviting members of the press in their "official capacity" would necessarily involve opening the hearing to the public. Therefore, parents would not be permitted to invite members of the press while maintaining a closed hearing. The decision to open or close a hearing is not provisional, meaning that parents may not open a hearing to the public for an individual not described above while otherwise maintaining a closed hearing. OSEP further explained that hearings officer have the duty under IDEA to conduct a fair and impartial hearing. To that end, hearing officers may remove any participant or observer whose conduct interferes with the operation of the hearing or is otherwise disruptive.

WHY YOU SHOULD CARE:

Unfortunately, OSEP's opinion appears to be an open invitation for parents to invite any number of observers with tenuous connection to either the school, the child, or (most likely) both. The standard articulated by OSEP, one which is wholly absent from the language of IDEA or its implementing regulations, is based on the

"general support" an observer may be able to offer to the parents, whether an aunt, an advocate-in-training, a close neighbor, or even the family's dog sitter. *Id.* *1. When presented with this scenario, a district should begin making a record with the hearing officer, objecting to the presence of invited third parties at the hearing, lest the proceedings become a circus. Ultimately, the IHO has the final authority to determine how many guests the parents may invite; however, every interpretation, comment, disturbance, or other distracting action should be documented in the transcript.

***

Jack Feldman is a Senior Partner with Frazer & Feldman, LLP, a law firm in Garden City.

Timothy M. Mahoney an Associate with Frazer & Feldman, LLP, provided research, writing and assistance.